

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-1336

THE GREATER BOSTON CHINESE CULTURAL ASSOCIATION, INC.

vs.

BOARD OF ALDERMEN OF NEWTON & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, The Greater Boston Chinese Cultural Association (GBCCA), appeals from a judgment entered by a judge of the Land Court granting partial summary judgment to the defendant, Young Investments, LLC (Young), a real estate development company seeking to construct a building on property it owns in Newton abutting GBCCA's property.² In his decision on the parties' cross motions for summary judgment, the judge upheld the December 2, 2013, order of the defendant, the board of aldermen of Newton (board), which approved Young's site plan and granted Young's application for special permits. GBCCA

¹ Young Investments, LLC.

² The parties stipulated to the dismissal of count II of GBCCA's second amended complaint with prejudice prior to the entry of judgment. As such, this partial motion for summary judgment related to the only remaining claim at issue (count I), and the case as a whole has thus been decided by the Land Court.

argues that the judge did not make "independent findings that [Young's proposed building] meets the criteria for issuance of a valid special permit," and that the judge "erred in upholding the board's unreasonable interpretation of the [Newton zoning ordinance's (ordinance)] ambiguous side-yard setback provision." We affirm the judgment.

Discussion. "Pursuant to Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974), summary judgment shall be rendered . . . [if] there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 393 (2003) (quotation omitted). "We review the Land Court judge's summary judgment decision de novo. Because the judge does not engage in fact finding in ruling on cross motions for summary judgment, we owe no deference to his assessment of the record." Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 517-518 (2011) (citation omitted).³ We assume, without deciding, that GBCCA has standing.⁴

³ We need not reach the question whether the judge abused his discretion in refusing to strike exhibits one through five attached to the affidavit filed by Young in support of its motion for partial summary judgment because we have not considered them. We also need not reach the question whether the judge abused his discretion in allowing GBCCA's motion to strike portions of the affidavit filed in support of Young's motion for partial summary judgment.

⁴ As GBCCA loses on the merits, we need not resolve this issue.

"Because the record compiled for summary judgment is open to our independent consideration, we have made an independent compilation of the relevant facts to frame the ultimate legal question whether summary judgment is appropriate." Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 123 n.1 (1997). As GBCCA injected documents into the record, "[w]e . . . treat them as proper parts of the summary judgment record" and consider them for their full evidentiary value. Boston v. Roxbury Action Program, Inc., 68 Mass. App. Ct. 468, 469 n.3 (2007).

1. Side yard setback. GBCCA challenges the board's approval of Young's site plan which would place the proposed building 5.6 feet away from the common lot line shared by GBCCA and Young. The side yard setback line for the proposed building, whose height is 35.6 feet⁵ and in a Business 1 zoning district, is determined by reference to the ordinance's § 30-15, Table 3, note 2 (footnote 2), which states, "1/2 bldg. ht. -- one-half the building height or a distance equal to the side yard setback of the abutting property at any given side yard except, when abutting a residential zone, the setback shall be

⁵ In spite of some inconsistency in the record, the parties agree in their briefs that the height of the proposed building is 35.6 feet.

one-half the building height or fifteen feet, whichever is greater."⁶

We disagree with GBCCA's contention that the clause "whichever is greater" applies regardless whether the lot line abuts a residential zone, and conclude that it applies only to the distances in the residential zone exception clause preceding it. Our interpretation follows the "general rule of statutory, as well as grammatical, construction that a clause is construed to modify only the last antecedent unless there is something in the subject matter or dominant purpose of the provision that requires departure from this rule."⁷ Massachusetts Zoning Manual § 12.2(f), at 12-10 (Mass. Cont. Legal Educ. 2010 & Supp. 2015), citing Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829, 833 (1985). See Mauri v. Zoning Bd. of Appeals of Newton, 83

⁶ Although a residential district abuts Young's property to the north and northwest, both Young's and GBCCA's properties are in a Business 1 district, so the specific side yard setback along the common lot line does not trigger the exception clause for that particular setback.

⁷ We also construe the ordinance "sensibly, with regard to its underlying purposes and, if possible, as a harmonious whole." Valcourt v. Zoning Bd. of Appeals of Swansea, 48 Mass. App. Ct. 124, 129 (1999) (citation omitted). Note 3 to Table 3 of § 30-15 (footnote 3) provides that "[w]hen abutting a residential or public use zone, the rear setback in the Business 1-4 Districts shall be 1/2 building height or 15 feet, whichever is greater." The clause in footnote 3 -- "whichever is greater" -- clearly cannot apply when there is no abutting residential or public use property, reinforcing our belief that the rule of the last antecedent applies to footnote 2.

Mass. App. Ct. 336, 342 (2013). The board was thus presented with two side yard setbacks to select from: a distance equal to GBCCA's side yard setback along the common lot line (4.7 feet) or one-half the height of the proposed building (17.8 feet); absent a mandate in the ordinance to the contrary, the board was permitted to exercise its discretion and choose the lesser distance.⁸ See Van Arsdale v. Provincetown, 344 Mass. 146, 149-150 (1962).

Alternatively, were we to adopt GBCCA's position that footnote 2 is ambiguous, we would reach the same conclusion. The board's interpretation of the side yard setback requirement is not unreasonable, given that the proposed building will be farther from the common lot line than GBCCA's building, and we defer to the board's interpretation of its own ordinance. See Livoli v. Zoning Bd. of Appeals of Southborough, 42 Mass. App. Ct. 921, 923 (1997); Tanner v. Board of Appeals of Boxford, 61

⁸ The side-yard setback is uniformly 4.7 feet, even though only a portion of GBCCA's building is that close to the common lot line. See § 30-1 of the ordinance (defining "[s]etback line" as "[a] line equidistant from the lot line which establishes the nearest point to the lot line at which the nearest point of a structure may be erected"); § 30-15(e) (repeating portions of set back line definition).

Mass. App. Ct. 647, 649 (2004). We see no error in the board's approval of Young's proposed side yard setback of 5.6 feet.⁹

2. Special permit. Section 30-24(d) of the ordinance provides that "[t]he board of aldermen shall not approve any application for a special permit unless it finds, in its judgment, . . . that the application meets all the . . . criteria [listed in § 30-24(d)(1)-(5)]." GBCCA argues that the judge erred in upholding the board's decision because the board failed to make the findings required by § 30-24(d)(2)-(4) and lacked sufficient evidence to make those findings.¹⁰ We disagree and recite the evidence in the summary judgment record that warrants the board's findings, viewing the evidence in the light most favorable to GBCCA. See 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 699 (2012).

a. Section 30-24(d)(2). Section 30-24(d)(2) of the ordinance requires that the board find that "[t]he use as developed and operated will not adversely affect the neighborhood." Young has proposed a three-story, mixed-use

⁹ GBCCA's argument that both the board and the judge failed to give meaning to the phrase "any given side yard" in footnote 2 is meritless.

¹⁰ Although GBCCA now claims that we must consider the board's findings as to § 30-24(d)(1) of the ordinance, that claim was waived below when GBCCA responded to Young's third and fourth interrogatories by conceding that the only special permit criteria not properly supported in the board's decision were § 30-24(d)(2)-(4).

building in West Newton village in a Business 1 zoning district. Renderings of the proposed building suggest that its above-grade height of 35.6 feet will be comparable to existing, neighboring structures. The peak elevation of the proposed building will be ninety-two feet, which is comparable to that of GBCCA's building (93.47 feet) and 56-66 Webster Street (99.23 feet).¹¹ The planning department of Newton observed that

"[a]lthough the building will be larger than many in the neighborhood, the petitioner has incorporated a number of building treatments that help to mitigate the mass of the structure. The building features an articulated facade so that there is in no case one large uninterrupted wall. The placement of windows and balconies also adds interest to the building's exterior. . . . The petitioner submitted a landscaping plan that softens the appearance of the structure as well as breaks up its overall mass."

The planning department concluded that the floor area ratio of the proposed building "is appropriate in the context of the neighborhood." Although Young's site plan required the use of a density incentive, see § 30-24(f)(16) of the ordinance, this will result in three "inclusionary units" in the building, which the planning department concluded was "in accordance with the objectives in the Comprehensive Plan."¹² The planning department also made the following observations about the suitability of Young's proposed building:

¹¹ 56-66 Webster Street abuts Young's property.

¹² The judge explained that the Comprehensive Plan, adopted by the board in 2007, "makes certain recommendations in anticipation of future population growth, with a goal of stemming the decline in rental housing in [Newton]."

"The 2007 Comprehensive Plan seeks to provide additional housing units on underutilized parcels within village centers that are in close proximity to public transportation options, while providing a diversity of housing sizes and types and contributing to the stock of affordable units. This proposal will help to accomplish all of these objectives by providing smaller rental units within walking distance to bus and rail transportation and other amenities within the village center."

GBCCA maintains that the proposed building would adversely affect the neighborhood because the transportation system cannot support the business and the thirteen residences that Young has proposed. GBCCA acknowledged in its deposition that there was public transportation near the proposed building but nevertheless contended that the buses and the commuter rail do not "run frequently" and that buses do not run on Sundays. GBCCA also contended that its members feel that the commuter rail is "not very convenient to use." However, public transportation will not be required to reach various amenities that are within walking distance, and because the proposed building will have nineteen parking spaces, some residents may be able to drive their own vehicles rather than rely on public transportation. As GBCCA conceded in its deposition that it has conducted no study about the effectiveness of the existing public transportation system in West Newton, its claim that the current transportation system is inadequate is unduly speculative.

b. Section 30-24(d) (3). Section 30-24(d) (3) of the ordinance allows the board to grant a special permit when it finds that "[t]here will be no nuisance or serious hazard to vehicles or pedestrians." Young's site plan features two-way traffic on a single, twelve-foot wide driveway on the northern side of the property, leading to and from the proposed building's underground garage entrance. Young intends to install a signal light and signage to alert drivers that two-way traffic is permitted on the driveway. Although two of the underground parking stalls will be undersized, the planning department concluded that "[those] stalls are located at the end of a row and will not likely interfere with the safe use of the parking facility." GBCCA acknowledged during its deposition that its concern as it relates to parking and traffic is about the number of parking spaces, not the layout of the parking garage; it is not concerned with the layout of the driveway and entrance to the parking garage. We therefore need not reach the question whether the driveway or the undersized spaces will be a "nuisance or serious hazard to vehicles or pedestrians."

To help ensure pedestrian safety, the planning department commented that Young "will provide a contribution of \$3,500 towards the installation of a pedestrian-activated signal at the intersection of Cherry Street and Washington Street to provide

safe access to the commuter rail and bus stop on the south side of Washington Street."

There is also nothing in the record that would lead us to conclude that the northern retaining wall, which required a special permit to build inside the northern setback, would be a "nuisance or serious hazard to vehicles or pedestrians."

Based on diagrams of that retaining wall, it will be largely shielded from the view of the northern abutters by a composite fence. Further, because GBCCA abuts Young to the south, there is nothing in the record that would lead us to believe that a retaining wall near the northern edge of Young's property could harm GBCCA or its visitors.

c. Section 30-24(d)(4). The board may grant a special permit if it finds that "[a]ccess to the site over streets is appropriate for the type(s) and number(s) of vehicles involved." There is a municipal parking lot near Young's property that may decrease the need for parking on Young's lot during weekdays, but based on GBCCA's deposition, we conclude that this lot is frequently busy on evenings and weekends. The planning department observed that "[c]overed bicycle parking will be provided in the below-grade parking garage to encourage the use of alternative modes of transportation." Massachusetts Bay Transportation Authority bus stops and a commuter rail stop are also within walking distance of the proposed building. This

evidence supports the planning department's conclusion that "[s]ince this parking structure will only service the residents of the building, the traffic volume will be light."

The garage for the proposed building has a twenty-two foot wide aisle, two feet less than normally required by the ordinance, but a "turning template" was provided to the planning department to establish that there was adequate maneuvering space. The planning department concluded that "a waiver for aisle width is appropriate for the type and number of vehicles that will be accessing the site."

Although GBCCA claimed in its deposition that traffic would increase when the proposed building was occupied, GBCCA conceded that it did not have evidence to dispute the planning department's conclusion that additional traffic generated by the proposed building would be "light." The board was not required to find that the proposed building would generate no new traffic, only that "[a]ccess to the site over streets is appropriate for the type(s) and number(s) of vehicles involved."

The board made a finding for each of these three criteria. There was ample evidence on the summary judgment record to warrant each of these findings. We have independently ascertained that the board "[made] an affirmative finding as to the existence of each condition of § 30-24(d)(2)-(4) of the ordinance required for the granting of the . . . special permit,

. . . [and we] independently [conclude] that each of those conditions [was] met." Vazza Properties, Inc. v. City Council of Woburn, 1 Mass. App. Ct. 308, 311 (1973) (citations omitted). Upon our review of the undisputed evidence before us, we conclude that Young's intended uses of the property for which the board granted the special permits are in "harmony with the general purpose and intent of the [ordinance] . . . and that . . . there is nothing in the [summary judgment record] to suggest that the board's decision was based on a legally untenable ground, or . . . [was] unreasonable, whimsical or arbitrary." Caruso v. Pastan, 1 Mass. App. Ct. 28, 29-30 (1973) (quotation omitted).

Conclusion. The board acted properly in granting Young's application for special permits and approving Young's site plan. Young has "carr[ied] its burden by showing that [GBCCA] has no reasonable expectation of proving" the contrary, and GBCCA has failed to "show, with evidence, the existence of a material dispute" (emphasis added) about any issue before us that would lead us to a contrary conclusion.¹³ Marhefka v. Zoning Bd. of

¹³ GBCCA conceded in its response to Young's interrogatories that "GBCCA [did] not contend that any evidence presented to the Board was 'not true,'" and also conceded during its deposition that the board had some evidence before it to support each of the findings now appealed.

Appeals of Sutton, 79 Mass. App. Ct. at 518. See Mass.R.Civ.P.
56(e), 365 Mass. 824 (1974).

Judgment affirmed.

By the Court (Kafker, C.J.,
Hanlon & Neyman, JJ.¹⁴),



Clerk

Entered: August 29, 2016.

¹⁴ The panelists are listed in order of seniority.